FAIZAL ZAINI v. PP

HIGH COURT SABAH & SARAWAK, SIBU
LIM HOCK LENG JC
[CRIMINAL APPEAL NO: SBW-42H-2-3-2018]
27 NOVEMBER 2018

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Discrepancy in witnesses' testimony – Issue of mistaken identity – Whether taken into consideration – Whether identification evidence gave rise to reasonable doubt – Whether there were gaps in evidence relating to arrest of accused person – Whether conviction and sentence ought to be set aside*

The appellant was convicted on a charge of armed robbery and was sentenced to a term of imprisonment of seven years and two strokes of whipping pursuant to ss. 392 and 397 of the Penal Code. The appellant appealed against the conviction and sentence. The appellant's defence, essentially, was that he was at home when the robbery took place.

Held (allowing appeal; setting aside conviction and sentence):

(1) The SCJ, having deliberated whether there was any reason for the victim ('PW1') and her son ('PW3') to wrongfully implicate the appellant, concluded that there was no good reason for them to do so when the appellant was unknown to them. However, the issue of mistaken identity did not appear to have been taken into consideration, a significant omission. The suspect was unknown to PW1 and she only had the opportunity to see him for a short time. A witness can be very convincing even though she may be mistaken. Further, the identification evidence by PW3 gave rise to a reasonable doubt about the conviction of the appellant. (paras 9, 10 & 12)

(2) There were gaps in the evidence relating to the arrest of the appellant. The appellant was arrested by PW4 at a coffee shop. There was no explanation given by PW4 as to why he had gone there with an arresting party when the appellant's position was that he had been asked to be present at the coffee shop. The premises at which the robbery took place was also not dusted for fingerprints. (paras 15 & 16)

(3) The evidence of PW3 differed from the evidence of PW1 as to the identity of the robber, hence, raising reasonable doubt as to the identification of the appellant by PW1. There were no material details as to the identification parade which was conducted by Insp. Suhaili. Inspector Suhaili did not give evidence because she was on maternity leave. However, the statement that she was on maternity leave was a bare statement and the copy of the letter to confirm the same was not marked. The trial judge could have adjourned the case to await her testimony after her maternity leave. Section 32 of the Evidence Act

1950 should not have been invoked to admit the identification parade report as evidence. The appellant was also deprived of an opportunity to cross-examine Insp. Suhaili on the position that PW1 had recognised him through a photograph taken some 13 years ago on the wall of the police station. In the circumstances, the conviction and sentence were set aside (paras 15, 17-19, 21 & 22)

Case(s) referred to:
Jaafar Ali v. PP [1999] 1 CLJ 410 HC ***(refd)***
Mohamad Shakir Zufayri Ariffin v. PP [2017] 1 LNS 1231 HC ***(refd)***
PP v. Arumugam Muniandy & Ors [2018] 1 LNS 369 CA ***(refd)***
PP v. Mohd Khairol Faizi Abu Bakar [2017] 1 LNS 126 CA ***(dist)***
Tan Kim Hoo v. PP & Another Appeal [2007] 6 CLJ 557 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 402A
Evidence Act 1950, ss. 32, 134
Penal Code, ss. 392, 397

For the appellant - Augustine Liom; M/s Tang & Co Advocs
For the respondent - Muhammad Tajul Aariffin Musa; DPP

Reported by S Barathi

JUDGMENT

Lim Hock Leng JC:

[1] The appellant was convicted on a charge of armed robbery. According to the charge, he had used a knife to rob one Jaliha bt Baduwi of a gold ring on 19 November 2016, at about 4pm, at her rented residence in Sibu. He was sentenced to a term of imprisonment of seven years and two strokes of whipping, pursuant to ss. 392 and 397 of the Penal Code.

[2] The appeal is against conviction and sentence.

[3] The prosecution had called five witnesses:

(i) PW1 – the victim;

(ii) PW2 – the victim's husband;

(iii) PW3 – the victim's son who was ten years old at the time of the robbery and 11 years old when he testified at the trial;

(iv) PW4 – the arresting officer; and

(v) PW5 – the investigating officer.

[4] The appellant, who was unrepresented, elected to give evidence from the dock. His father (DW2) and his brother (DW3) also testified that he was at home when the robbery took place. That, essentially, was the appellant's defence.

[5] The learned Sessions Court Judge had rightly allowed the alibi evidence of the appellant, his father and brother to be admitted as the appellant was unrepresented and "would not know the need to serve such notice (of alibi)" pursuant to s. 402A of the Criminal Procedure Code. See *PP v. Arumugam Muniandy & Ors* [2018] 1 LNS 369; [2018] MLJU 374.

[6] The prosecution however objected to the appellant's mother and sister giving evidence that he was at home at the time of the robbery, only because they were present while the trial was ongoing. See NOP, 19 November 2017. It was thus that the appellant's father and brother testified. From the notes of proceedings, it appears that no direction was given that the courtroom be cleared of witnesses. The Sessions Court should have allowed the appellant's mother and sister to testify and reminded itself to view their evidence with circumspection. While evidence is to be weighed, not counted (s. 134 of the Evidence Act 1950), there is no telling whether the evidence of the mother and sister might have tilted the trial decision in his favour.

[7] The identification evidence of PW1 and PW3 played an important part in the conviction of the appellant.

[8] Although due deference must be given to the learned Sessions Court Judge who had the advantage of evaluating the audio-visual evidence at trial and the ensuing findings of fact, the court takes cognisance of the guiding principle of an appellate court. In *Mohamad Shakir Zufayri Ariffin v. PP* [2017] 1 LNS 1231 it was held:

> [25] In the case of *Dato' Seri Anwar Ibrahim v. PP & Another Appeal* [2004] 3 CLJ 737 Abdul Hamid HMP (as he then was) said at p. 752:
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> > Clearly, an appellate court does not and should not put a brake and not going any further the moment it sees that the trial judge says that is his finding of facts. It should go further and examine the evidence and the circumstances under which that finding is made to see whether, to borrow the words of HT Ong (CJ Malaya) in *Herchun Singh*'s case (*supra*) "there are substantial and compelling reasons for disagreeing with the finding. "Otherwise, no judgment would ever be reversed on question of fact and the provision of s. 87 CJA 1964 that an appeal may lie not only on a question of law but also on a question of fact or on a question of mixed fact and law would be meaningless.
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> [26] See cases of *Mahmad Bidin v. PP* [2016] 2 CLJ 123; (*Jagatheesan s/o Krishnasamy v. PP* [2006] 4 SLR 45; *Yap Giau Beng Terence v. PP* [1998] 3 SLR 656; *Sakthivel Punithavathi v. PP* [2007] 2 SLR 983; *PP v. Selvarajoo Ramachandran & Ors* [2005] 6 CLJ 114; [2005] 5 MLJ 282, *Sheo Swarup v. King Emperor* [1934] LR 61 14 398).
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> [27] The principle that can be distilled from these authorities is that the appellate court is under a duty to interfere when the trial court had seriously misdirected itself.

[9] From the grounds of judgment, it appears that the learned Sessions Court Judge deliberated whether there was any reason for the victim and her son, PW1 and PW3 respectively, to wrongfully implicate the appellant and concluded that there was no good reason for them to do so when the appellant was unknown to them.

[10] Nonetheless, the issue of mistaken identity does not appear to have been taken into consideration. It is an omission of significance. The suspect was unknown to her and she only had the opportunity to see him for a short time. After all, a witness can be very convincing even though she may be mistaken.

[11] In that connection, guidance may be drawn from *Tan Kim Hoo v. PP & Another Appeal* [2007] 6 CLJ 557 where the Court of Appeal held:

> ... we would gratefully adopt and apply as our own the following passage in the judgment of Karthigesu JA delivered for the Singapore Court of Appeal in *Thomas Heng Aik Ren v. Public Prosecutor* [1998] 3 SLR 465. His Honour said:
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> > In adapting the *Turnbull* guidelines for our local system, we have reworked the *Turnbull* guidelines into the following three-step test. The first question which a judge should ask when encountering a case against the accused depends wholly or substantially on the correctness of the identification evidence which is alleged by the defence to be mistaken.
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> > If so, the second question should be this. Is the identification evidence of good quality, taking into account the circumstances in which the identification by the witness was made? A non-exhaustive list of factors which could be considered include the length of time that the witness observed the accused, the distance at which the observation was made, the presence of obstruction in the way of the observation, the number of times the witness had seen the accused, the frequency with which the witness saw the accused, the presence of any special reasons for the witness to remember the accused, the length of time which had elapsed between the original observation and the subsequent identification to the police and the presence of material discrepancies between the description of the accused as given by the witness and the actual appearance of the accused. In considering the circumstances in which the identification was made, the judge should take note of any specific weaknesses in the identification evidence. If the evaluation of the identification evidence, the judge is satisfied that the quality of the identification is good, he may then go on to safely assess the value of the identification evidence.
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> Where the quality of the identification evidence is poor, the judge should go on to ask the third question. Is there any other evidence which goes to support the correctness of the identification? If the judge is unable to find other supporting evidence for the identification evidence, he should

then be mindful that a conviction which relies on such poor identification would be unsafe. The supporting evidence need not be corroborative evidence of the kind required in *R v. Baskerville* [1916] 2 KB 658. What the supporting evidence has to be is evidence that makes the judge sure that there was no mistake in the identification.

[12] In the appeal that now lies before this court, the identification evidence given by PW3 gives rise to reasonable doubt about the conviction of the appellant. Although PW3 had given evidence after satisfying the court of his ability to understand the nature of his affirmation and had testified that he could identify the appellant by just a glance, and that he had seen him at the scene of the crime before it was committed, PW3 had also wavered, in particular, when he testified as follows:

PW3's evidence-in-chief

Q23 : Amirul masih ingat rupa orang itu?

A : Tidak ingat.

and

PW3's evidence under cross-examination by the appellant

Q2 : Adakah kamu masih mengenali orang yang melakukan rompakan tersebut?

A : Tidak.

[13] Although PW1 was sure that the appellant was the one who robbed her, recognised his voice and had identified him at an identification parade and in the dock, her husband, PW2, who had lodged the police report on her behalf, did not give a description of the appellant except for "seorang lelaki lingkungan umur 20 an". Both PW1 and PW3 could not remember the attire of the appellant on the day of the robbery. PW3 could not remember the language which the robber used.

[14] Learned counsel for the appellant drew the attention of the court to a passage in *Jaafar Ali v. PP* [1999] 1 CLJ 410; [1998] 4 MLJ 406, 417, where Augustine Paul J (as he then was) held:

The quality of the identification evidence that is required includes a description of the accused that the identifying witness must have given to the police. The need for such description is implicit in *Turnbull* itself and has been stressed in cases such as *R v. Atfield* (1983) Alta LR (2d) 97; *R v. Power* (1987) 67 Nfld & PEIR 272 (refd) and *PP v. Amar Singh* [1948-49] MLJ Supp 55 (refd). In my opinion, it is necessary for an identifying witness to give a description of the accused especially in cases where the accused was not known to the witness prior to the incident. It may not be necessary where there is other supporting evidence on the identification of the accused and when the accused is well known to the witness.

[15] Importantly, there are gaps in the evidence relating to the arrest of the appellant and the identification parade which create reasonable doubt as to the conviction of the appellant, apart from the evidence of PW3 which differed from the evidence of PW1 as to the identity of the robber. That aside, the premises at which the robbery took place was not dusted for fingerprints.

[16] The appellant was arrested on 20 November 2016, the next day, by PW4 at a coffee shop called My Kopitiam. PW4 gave no explanation as to why he had gone there with an arresting party of four other police personnel when the appellant's position was that he, the appellant, had been asked to be present at the coffee shop. What was the basis upon which the appellant was arrested, given the vague description given by PW2 in his police report? As will be set out shortly, there are other reasonable doubt about the prosecution's case which render the conviction unsafe.

[17] There are no material details as to the identification parade which was conducted on 21 November 2016 by Inspector Suhaili binti Mahad, for example, the number of people who participated, whether they bore a physical resemblance to the appellant, or whether the appellant stood out, or whether the appellant was the sole person in the parade.

[18] The identification parade report marked exh. P4 is bereft of any material details and Inspector Suhaili did not give evidence. The statement by the learned DPP on 27 September 2017 that she was on maternity leave is a bare statement. The copy of the letter to confirm that she is giving birth at Hospital Ampang was not marked.

[19] In any event, as learned counsel for the appellant points out, the trial could have been adjourned to await her testimony after her maternity leave which was said to extend to 17 December 2017. Section 32 of the Evidence Act 1950 ought not to have been invoked to receive the identification parade report as evidence.

[20] In respect of the learned DPP's contention that the dock identification stands even if the identification parade evidence is rejected and his reliance on the Court of Appeal's decision in *PP v. Mohd Khairol Faizi Abu Bakar* [2017] 1 LNS 126; [2017] MLJU 179, it is to be noted that the identification of the accused in that case was not in question or challenged. See paras. 14, 15, 23 and 25. Further, in *Jaafar Ali (supra)*, it was held that "(dock identification) would have value only if the quality of the identification of the accused ... was good." Given that PW3 had contradicted himself as to the identity of the appellant, there is reasonable doubt as to the identification of the appellant by PW1.

[21] The appellant was deprived of an opportunity to cross-examine Inspector Suhaili on his position that PW1 had recognised him through a photograph (of him sometime 13 years ago) on the wall of the police station.

[22] In the circumstances, the appeal is allowed. The conviction and sentence are set aside.